

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION**

**UNITED STATES OF AMERICA )**

**v. )**

**Criminal No. 3:03CR00013**

**SHAWN ARNETTE BREEDEN,  
MICHAEL ANTHONY CARPENTER,  
Defendants )**

**MEMORANDUM OPINION**

**By: Samuel G. Wilson  
United States District Judge**

The court has before it the United States' motions in limine concerning the admissibility of Michael Carpenter's statement to law enforcement officials following his arrest, the admissibility of evidence of crimes committed by Carpenter and Robbie Outterbridge in Washington D.C., and the admissibility of evidence of crimes committed by the defendants on August 8 and 9. Shawn Breeden has moved for a severance. The court finds that Carpenter's statement to law enforcement is not admissible. The court further finds that, while evidence of crimes committed by the defendants on August 8 and 9 is admissible, evidence of crimes committed by Carpenter and Outterbridge in Washington, D.C. is not admissible without a more fully developed factual record. Because the court excludes evidence of Carpenter's statement to police, Breeden's motion to sever is denied.

**I.**

The government alleges that on August 8, 2002, defendants Shawn Arnette Breeden, Michael Anthony Carpenter, Kevin Thomas Cassell, and Robbie Dione Outterbridge traveled from Washington, D.C. to Charlottesville, Virginia and murdered Kevin Lee Hester, and has charged

defendants with offenses that carry a potential sentence of death.<sup>1</sup> Cassell and Outterbridge have since pled guilty, and the court has set Breeden and Carpenter's joint trial for September 27 through October 15, 2004.

Following Carpenter's arrest, federal agents interviewed him at the Washington, D.C. field office of the Bureau of Alcohol, Tobacco, and Firearms. He admitted his involvement in Hester's robbery and murder, and explicitly implicated his co-defendant, Breeden. Carpenter's interview was videotaped, and he also gave a written statement. The government seeks to introduce at the joint trial portions of Carpenter's statement through testimony of one of the interviewing officers, omitting his references to Breeden to avoid violating Breeden's Sixth Amendment right of confrontation. The United States also seeks to introduce evidence showing that over a period of two years before Hester's murder, Carpenter and Outterbridge collaborated on a series of armed robberies in the Washington, D.C. area and evidence that the defendants carried out two robberies during the night of August 8-9, before Hester's murder.

## II.

The government contends that its introduction of redacted portions of Carpenter's statement does not violate Breeden's confrontation right. Breeden counters that, because Carpenter is likely to

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<sup>1</sup>The indictment against Breeden and Carpenter charges them with a drug conspiracy in violation of 21 U.S.C. § 841(a)(1), traveling in interstate commerce with intent to commit a crime of violence to further an unlawful activity in violation of 18 U.S.C. § 1952, traveling in interstate commerce with the intent to intimidate another person and placing the person in reasonable fear of death and serious bodily harm in violation of 18 U.S.C. § 2261A, and three counts of using a firearm in relation to a crime of violence or a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). Because the use of the firearm resulted in the death of a person, the final three counts carry a potential sentence of death. 18 U.S.C. 924(j).

introduce the videotape featuring the unredacted statement to challenge its voluntariness, redaction alone is insufficient to protect his Sixth Amendment rights. The court finds that, although Carpenter's introduction of the full statement may be for a nonhearsay purpose or may fall within a historical exception to the hearsay rule, the evidence should nevertheless be excluded under Federal Rule of Evidence 403, because of the significant risk of unfair prejudice and jury confusion.

The government argues that the testimony it seeks to offer regarding Carpenter's statement does not implicate Breeden. Under Bruton v. United States, any statement by a non-testifying co-defendant that implicates another defendant must be properly redacted to protect the defendant's Sixth Amendment right to confront witnesses against him. 391 U.S. 123 (1968). "A defendant's statements are admissible if the co-defendant's name is redacted and replaced with a neutral pronoun or phrase such as 'person' or 'individual'. . . provided there is reasonable assurance that use of such a neutral phrase does not result in a statement that is 'directly accusatory'. . . in the same manner as an unredacted or unrevised statement." U.S. v. Smallwood, 307 F. Supp. 2d 784, 788-89 (E.D. Va. 2004) (citing Fourth Circuit cases). The government proposes to redact Carpenter's statement by having its witness indicate that Carpenter referred to "others" or "other individuals" where he expressly implicated Breeden. Breeden argues that such redaction is insufficient to protect his rights because, while the government will redact Carpenter's statement to avoid implicating Breeden, counsel for Carpenter will likely introduce the full videotape of the statement on cross-examination to challenge its voluntariness, thus allowing the jury to hear Carpenter implicate Breeden.

Although the government might be correct that introduction of the unredacted statement on

cross-examination would not violate Breeden's confrontation right because it is nonhearsay,<sup>2</sup> the court nevertheless finds that evidence inadmissible pursuant to Rule 403, because admission of the statement in the manner contemplated by the parties presents a substantial likelihood of unfair prejudice and confusion of the issues, which outweighs its probative value.<sup>3</sup> The prejudice inquiry asks whether "the jury [would be] likely to consider the statement for the truth of what was stated with significant resultant prejudice." U.S. v. Reyes, 18 F.3d 65, 70 (2d Cir. 1994). Admission of Carpenter's redacted statement by the government followed by admission of the full statement on cross-examination poses a significant risk that the jury may consider Carpenter's implication of Breeden for its truth, and not merely to determine whether the statement was voluntary.

If the court were to follow the government's suggested course of action, upon introduction of the redacted statement by testimony of the government's witness, the court would instruct the jury to consider Carpenter's statement only against Carpenter, and not against Breeden. Upon admission of the unredacted videotape, the court would have to further instruct the jury that the tape could be considered for purposes of evaluating whether Carpenter's statement was voluntary, as well as for substantive purposes against Carpenter. However, the tape could not be considered for its truth against Breeden. These limiting instructions would require mental gymnastics nearly impossible for a

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<sup>2</sup>Admission of a non-testifying co-defendant's statement for a nonhearsay purpose does not violate the defendant's right of confrontation. See Tennessee v. Street, 471 U.S. 409, 417 (1985). Here, Carpenter does not seek to admit the out-of-court statement for its truth, but rather for the limited purpose of demonstrating the circumstances surrounding and voluntariness of the statement.

<sup>3</sup>Rule 403 allows the trial judge to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." Fed. R. Evid. 403.

jury to perform. Because Carpenter's full statement incriminates Breeden, it is prejudicial, and the consequences of the jury's failure to follow the court's limiting instructions pose a threat to Breeden's fundamental right to a fair trial. For this reason the court finds that evidence of Carpenter's statement to law enforcement officials is inadmissible on the question of guilt.

### III.

The government also seeks to admit evidence of robberies committed by the defendants on August 8-9. The court finds that this evidence is admissible as "background evidence" which is intrinsic to the charged conspiracy. Proper background evidence consists of those acts having a "causal, temporal, or spatial connection" with the charged offense that are "inextricably intertwined" with the charged offense or that are necessary to "complete the story" of the charged offense. U.S. v. Hardy, 228 F.3d 745, 748 (6th Cir. 2000). The court finds that evidence of the two robberies committed by the defendants in Charlottesville in the hours immediately before Hester's murder are sufficiently linked to the murder in both time and geography to make evidence of these acts admissible to "complete the story" of the charged offense. See id.

However, the court is unable to find, on the factual record before it, that the robberies committed in Washington, D.C. by Carpenter and Outterbridge during the two years before Hester's murder are proper background evidence. While the court notes that this evidence may be admissible to establish the development of the charged conspiracy, the government has not shown that these robberies have a "causal, temporal, or spatial connection" to Hester's murder. See id. Unless the court has the opportunity to rule on a more fully-developed factual record, evidence of the Washington,

D.C. robberies is excluded.<sup>4</sup>

#### IV.

Breeden has moved for a severance, claiming that admission of Carpenter's statements and admission of evidence of the Washington, D.C. robberies will cause unfair prejudice.<sup>5</sup> Because the court's exclusion of Carpenter's statement and the government's evidence of the Washington, D.C. robberies sufficiently addresses Breeden's concerns, the court sees no risk of prejudice in permitting the joint trial to proceed, and therefore denies Breeden's motion to sever.<sup>6</sup>

#### V.

For reasons stated, the court finds that evidence of defendant Carpenter's written statement and videotaped statement to law enforcement officials is inadmissible under Rule 403. The court finds further that evidence of robberies committed by the defendants on August 8-9 is admissible background evidence. However, because the court cannot find on this record that evidence of robberies committed in Washington, D.C. is proper background evidence, or that such evidence is admissible under Rule

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<sup>4</sup>Nor can the court find, on the record before it, that evidence of the Washington, D.C. robberies is admissible under Rule 404(b) for purposes of showing preparation, plan, or modus operandi. The court is not satisfied at this time that the probative value of such evidence outweighs the danger of unfair prejudice to the defendants.

<sup>5</sup> The Supreme Court has provided that "when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. United States, 506 U.S. 534, 539 (1993).

<sup>6</sup>Breeden also claims that evidence of Carpenter's recent escape attempt will unfairly prejudice him. Because the court sees no indication that this evidence will incriminate Breeden, or that the jury will mistakenly attribute such misconduct to Breeden, the court finds no basis for severance.

404(b), that evidence is excluded. Finally, because the court finds no risk that Breeden's rights would be compromised by proceeding with a joint trial, his motion to sever is denied.

**ENTER:** This 17th day of September, 2004.

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UNITED STATES DISTRICT JUDGE

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**SHAWN ARNETTE BREEDEN,  
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**ORDER**

**By: Samuel G. Wilson  
United States District Judge**

In accordance with the accompanying memorandum opinion entered on this day, it is

**ORDERED** and **ADJUDGED** that:

- (1) Defendant Breedon's motion to sever is **DENIED**;
- (2) The United States' motion in limine to admit evidence of defendant Carpenter's statement to law enforcement officials is **DENIED**.
- (3) The United States' motion in limine to admit evidence of robberies committed by defendants Carpenter and Outterbridge in Washington, D.C. is **DENIED**.
- (4) The United States' motion in limine to admit evidence of robberies committed by the defendants on August 8-9 is **GRANTED**.

**ENTER:** This 17th day of September, 2004.



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UNITED STATES DISTRICT JUDGE